# Exhibit 14

**to**

**Affidavit of Daniel M. Reilly**
**in Support of Joint Memorandum of**
**Law in Opposition to Proposed Settlement**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK**

**In the matter of the application of**

**THE BANK OF NEW YORK MELLON,**
**(as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), et al.**

**Index No. 651786-2011**

**Kapnick, J.**

**EXPERT REPORT**

**OF**

**TAMAR FRANKEL**

## QUALIFICATIONS

I am a Professor of Law at Boston University, and have been teaching at Boston University School of Law since 1968. I was awarded a Law Degree from the Jerusalem Law Classes (Israel) in 1948 and the LL.M. and S.J.D. degrees from Harvard Law School in 1964 and 1972, respectively. I have taught courses on corporations, trusts and estates, securities regulation, insurance, securitization (asset-backed securities), investment management regulation, and seminars on fiduciary law, pension fund regulation (ERISA), and Internet Issues. Throughout the years, I was a Visiting Professor at Harvard Law School (1979, 2005), Harvard Business School (1980, 2006), and at the University of California, at Berkeley (1981); a Visiting Scholar at the Brookings Institution in Washington D.C. (1987) and an Attorney Fellow at the Securities and Exchange Commission ("SEC" or "Commission"), Division of Investment Management (June - December 1995; and July 1996 - July 1997). As an associate at the firm of Arnold & Porter, Washington, D.C. (1965-1966), I worked in the areas of general corporate, securities, and commercial law. As a consultant to Bankers Trust Company, New York (1982-1986), I worked mainly on matters of securities regulation, the Investment Company Act of 1940 and Investment Advisers Act of 1940, as they related to banks and bank trust departments.

Among my publications are a four-volume treatise, *The Regulation of Money Managers (Mutual Funds and Advisers)* (2d ed. 2001) (with Ann Taylor Schwing) (Aspen Law & Business), a two-volume treatise on *Securitization (Structured Financing, Financial Assets Pools, and Asset-Backed Securities)* (2d ed. 2006), *Trust and Honesty, America's Business Culture at a Crossroad* (Oxford University Press 2006), and *Fiduciary Law* (Oxford University Press, 2010). My other publications are listed in Appendix A, attached to this Report.

Throughout the years, I have testified as an expert witness before congressional committees, before the SEC, in court, and in arbitration

This distinction reflects the design of fiduciary law applicable to trustees: the more power and control a trustee exercises, the higher the trustee's duties must be. Before the Event of Default the functions and powers of a trustee are more predictable and can be more clearly specified and limited in the trust instrument. Hence, its duties are *similar* to those of a contract party.[12] After the Event of Default, the detailed powers and functions of a trustee depend on an agreed upon purpose but its achievement requires more discretion, depending on the different circumstances. These services cannot be as easily specified in the trust instrument. As a trustee exercises greater discretion, the trustee's duties and the strictness of the duties rise.

Yet at all times, before and after the Event of Default, regardless of what the relationship is called, a trustee must avoid conflicts of interest and perform its functions with appropriate care.[13] That is because even before an Event of Default a trustee has fiduciary duties. In fact, if the trustee presumes that it is strictly a contract party a serious question arises as to whether it even attempted to adhere to its fiduciary duties and whether this posture does not violate its duties. The distinction of contract-fiduciary status is crucial. Contract parties are presumed to be able to ensure their interest in the contract and a contract breach is measured by the damages incurred. Trust beneficiaries, on the other hand, are presumed to be *unable* to ensure their interests. That is why fiduciaries must act in the beneficiaries' "*sole* interest."[14] Neither the entrusted assets nor entrusted power belong to the trustee.

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[12] I emphasize the word "similar" because contract parties are presumed to be able to protect themselves from the other party's violation of its promises while such protection by beneficiaries of their fiduciaries are presumed to undermine the very utility of the relationship. The investors would not enter into the relationship if they had to control the Trustee's functions and trustworthiness.

[13] *Ellington Credit Fund*, 837 F. Supp. 2d at 191-92. This case names the relationship as contract before the Event of Default. However, the word contract is used to denote an agreement rather than contract **law**. That is why the same decision notes the conditions of the contract obligations. These obligations are subject to avoiding conflict of interest and negligence. *See also In re Bruches*, 415 N.Y.S.2d 664, 668 (2d Dep't 1979) ("If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment." (quoting Restatement (Second) of Trusts § 187 cmt. e)); *In re Stillman*, 107 Misc. 2d 102, 110 (Sur. Ct. 1980) (same).

[14] There are those who argue that fiduciaries need not act in the "sole" interest of the beneficiaries but only in the beneficiaries' "best interests." The difference smacks of contract, in which the fiduciary can serve itself and somehow, even in conflict of interest, is permitted to serve the beneficiaries. In fact, this approach is derived from the Civil Law. Judges in the Civil Law regime judge the fairness of the contract terms, unlike judges in the Common Law regime who ensure that the parties are capable of fending for themselves and then enforce the terms of the contract. *See* Tamar Frankel, *Fiduciary Law*, at 20 (2010) ("In Europe, contract does the work of trust."); *Id*. at 150-52.

In this case, the Trustee was a fiduciary of the Outsiders, particularly with respect to its activities concerning the Settlement. The Trustee's decision to enter into settlement negotiations is precisely the type of discretionary conduct that subjects trustees to the highest duties. There can be no question that the Trustee owed to the Outsiders fiduciary duties.

## B. The Trustee exceeded the power vested in it, as provided in the Governing Agreements, and the process by which the Settlement was reached was tainted by the Trustee's conflicts of interest, and lack of care

No fiduciary authority is unlimited.[15] The Trustee anchors its duties in the Governing Agreements.[16] Yet, duties and powers are linked. As one Court noted: "It is axiomatic that the powers of an indenture trustee are limited to those specifically articulated in the indentures themselves."[17] While some powers may be implied from express powers, these powers depend on the circumstances and are subject to the courts' interpretation.

In this case, the Governing Agreements do not grant the Trustee a specific power or function to negotiate or reach a settlement such as the Settlement.[18]

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[15] *Denver Nat'l Bank v. Von Brecht*, 322 P.2d 667 (Colo. 1958). A trust that vests on a trustee unlimited power is not a trust. It is probably a gift or at most custody. *See Morice v. Bishop of Durham*, 32 Eng. Rep. 947, 947 (1805) (where testator left remainder in trust "for such objects of benevolence and liberality as the trustee in his own discretion shall most approve," trust classification failed because the court could not exercise supervisory power, and remainder passed intestate). Once he consents to act, a fiduciary is bound by fiduciary duties even though he was promised nothing in return. A fiduciary is not entitled to any consideration, except perhaps quantum meruit. *See, e.g.*, Austin W. Scott & William F. Fratcher, The Law of Trusts 125 (4th ed. 1987) ("The trustee is held to the standard of a man of ordinary prudence, whether he receives compensation or whether he acts gratuitously. . . . The courts have ordinarily fixed a higher standard for bailees and agents who are compensated than they have fixed for those who act gratuitously. There is no similar distinction, however, as to trustees.").

[16] Hrg. Tr. 11:3-14:5 (Sept. 21, 2011) (Ingber); Hrg. Tr. 150:24-25 (Feb. 7, 2013) (Ingber).

[17] *Cont'l Bank, N.A. v. Caton*, No. 88-1611-C, 1990 U.S. Dist. LEXIS 11624, at *4 (D. Kan. Aug. 6, 1990) ("The rights and powers of the [Indenture] Trustee are a function of the Trust Indenture and cannot be generally expanded in contradiction of the Indenture by reference to broad common law principles.").

[18] [redacted]
Even if the Trustee has the power to bring suit against BoA after an Event of Default, it does not have the power to *forego the claims against BoA* without the consent of the investors whose rights are being extinguished. An analogy to the Trustee's powers is a lawyer's power to settle. *Fennell v. TLB Kent Co.*, 865 F.2d 498, 501-02 (2d Cir. 1989). The lawyer may have power to conduct the litigation. But that power does not by implication vest in the lawyer the unfettered power to settle the case. *Id.* (stating that generally "the decision to settle is the client's to make"; however, settlement may be upheld if there is apparent authority). One of the reasons for this distinction is that conducting the litigation requires the lawyer's expertise and the client's control is likely to undermine the conduct of the litigation. Settlement of a case,

The Governing Agreements also do not grant the Trustee the power to: (a) extend the 60-day cure period and avoid an Event of Default, nor (b) enter into a "forbearance agreement."[19] If the Trustee purports not to be bound by any *duties* that are not specified in the PSA,[20] it may not simultaneously assume *powers* that are unrelated to nonexistent duties. The Settlement is the result of the Trustee's assumption of powers that were not granted under the PSAs.

The Settlement should not be approved absent in-depth judicial scrutiny into the Trustee's conduct and the Settlement's substantive fairness to all investors. Even if the Trustee had acted within its enumerated powers, the assertion and exercise of this power must be accompanied by the duties of loyalty and care.

It is my opinion that the Trustee violated its duty of loyalty. It acted in conflict of interest by [redacted][21] In fact, [redacted][22] The evidence shows that [redacted][23] In fact, the Trustee continued and continues to seek a release from

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on the other hand, is not as time sensitive, and the lawyer's expertise is not necessarily decisive in determining the best settlement terms. In fact, the client may be the better or at least far more important decision-maker. A similar rationale would apply to the Trustee's authority to settle claims on behalf of the beneficiaries.

[19] [redacted]

[20] Tr. 11:3-14:5 (Sept. 21, 2012) (S.D.N.Y.); *see also* [redacted]

[21] Dep. Ex. 235 [redacted] Dep. Ex. 118 [redacted]

[22] Dep. Ex. 210, BNYM_CW-00254990-254998 at -00254991 [redacted]

[23] Dep. Ex. 235 [redacted] Dep.

Settlement agreement cannot bind the Outsiders without the Court's finding that the Settlement is fair to the unrepresented Outsiders.[37]

## C. The Need for Judicial Scrutiny of the Settlement and the Trustee's Requested Release

1. **Deference to Trustees.** Under certain conditions, not present here, the courts have deferred to the decisions of fiduciaries. For example, in the bankruptcy context, "[t]he standard for review of a trustee's decision regarding case administration is the business judgment rule. So long as the decision was not made arbitrarily, or in bad faith, it is appropriate for a bankruptcy court to accept the trustee's decision."[38] The bankruptcy trustee is far more qualified to deal with judicial claims than the Trustee in this case. Therefore, the bankruptcy trustee may negotiate settlements and compromise disputes, and the courts may approve these compromises or settlements. And yet, the "court may approve a proposed compromise only if it is 'fair and equitable' and supported by an adequate factual foundation. Several factors may be considered, including: (i) the probability of success in the litigation; (ii) the difficulty, if any, to be encountered in enforcement of the judgment(s); (iii) the complexity of the litigation, and the expense, inconvenience, or delay involved; and (iv) the paramount interest of creditors and a proper deference to their views. The burden of meeting the standards rests squarely on the trustee."[39]

The main reasons for judicial deference are the fiduciaries' *expertise* relating to the subject matter of fiduciaries' decisions, and the ability of the

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[37] *See, e.g., In re Lower Bucks Hosp.*, 471 B.R. 419, 453 (Bankr. E.D. Pa. 2012) (footnotes omitted) ("BNYM makes an unjustified leap in logic when it suggests that because it was the Bondholders' sole authorized representative, it had the legal right to put the interests of BNYM-Indemnitee ahead of the interests of the Bondholders. There is nothing about BNYM's status as the Bondholders' sole authorized representative that justifies acting in any manner other than in the Bondholders' interests. Nor does BNYM's lack of a threshold duty to act on behalf of the Bondholders following a default justify self-serving conduct once it undertook to represent the Bondholders' interests. Quite the opposite. Regardless of the label put on its role (contractual agent or fiduciary), once BNYM chose to act as the Bondholders' representative and participate in the settlement negotiations on their behalf, it was obliged to represent the interests of the Bondholders faithfully. A review of the relevant case law suggests that BNYM's argument to the contrary is utterly without merit.").

[38] *In Re: Interiors of Yesterday, LLC. Debtor*, Case No. 02-30563 (LMW), Chapter 7, Doc. I.D. Nos. 233, 275, 276, 363 U. S. Bankruptcy Court For the District of Connecticut, *2007 Bankr. LEXIS 449* (2007).

[39] In Re Rake, Debtor. Case No. 05-22188-TLM U.S. Bankruptcy Court For The District of Idaho *363 B.R. 146*; *2007 Bankr. LEXIS 549.*

beneficiaries and the markets to supervise and affect the way the fiduciaries continue to exercise their judgment (e.g., by making higher or lower risk decisions).[40]

Not surprisingly, judicial deference wanes and vanishes when fiduciaries make decisions while acting under conflict of interest or absent care or where the trustee lacks the requisite expertise. Even if a fiduciary has the required expertise, if its decision is tainted by conflicts of interest or lack of care the court should not defer to the trustee's decision. Drawing on the business judgment rule as an analogy: "The business-judgment rule merely creates a rebuttable presumption that corporate directors acted in good faith and in the best interest their company when making business decisions. It does not preclude judicial review of those decisions."[41] If a trustee, in contrast to directors, has less applicable expertise, the court's supervision of the trustee's decision should be broader.

2. **In this case none of the conditions for deference to the Trustee's actions exist.** First, as noted above, the Trustee's conduct during settlement negotiations involved both conflicts of interest and lack of care. The evidence shows that the Trustee was [redacted] Additionally, the Trustee failed to [redacted] together with its post hoc justification of the key settlement terms indicate a lack of due care. The Trustee [redacted] It rubber-stamped the Settlement agreement. Even the advisers that were hired in connection with the Settlement issued reports after the Settlement agreement had been reached in principle.

Second, and most importantly, the courts defer to the expertise of the fiduciaries (barring conflict of interest and lack of care). But the subject matter in this case goes beyond the expertise of the Trustee and is

[40] *Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979) (stating that business judgment doctrine "at least in part" is based on "recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments"; stating also that "responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility").

[41] *Townsend, et al. v. Antioch University C.A.*, Case No. 2008 CA 103 Court of Appeals of Ohio *2009 Ohio 2552*; *2009 Ohio App. LEXIS 2139*, May 29, 2009.

specifically and uniquely appropriate for court resolution.[42] The judges and juries are best equipped to address and resolve the factual and legal issues presented by the Trustee's petition. The Trustee seeks Court approval of—among other things—the negotiations, the factual and legal investigation, and the Trustee's evaluation of *legal claims.*[43] The settlement of *legal claims and a decision regarding the legal chances of success of a claim* are not within the Trustee's expertise. Indeed, the very reason the Trustee [redacted] Judicial deference to the expertise of trustees does not apply in this case. No deference is due nor warranted.

## CONCLUSION

This case is replete with sufficient "red flags" to raise the Court's full and detailed inquiry before approving this Settlement. The case involves Outsiders that were not a party to negotiations but who will be bound by the Settlement and the Court's approval of the Settlement. The Trustee and the Insiders [redacted] and further ask the Court, by articulating an unduly narrow standard of review, to avoid evaluating let alone determining the substantive fairness of the Settlement itself.

In light of the circumstances as expressed in my opinion, no deference is due to the Trustee's actions. The Court should not grant the Trustee's application without engaging in an in-depth evaluation of the Trustee's conduct and the Settlement's substantive fairness to all investors.

[42] *Id.* at 1002 (holding that "[a]s to the methodologies and procedures best suited to the conduct of an investigation of facts and the determination of legal liability, the courts are well equipped by long and continuing experience and practice to make determinations" and "[i]n fact they are better qualified in this regard than are corporate directors in general").

[43] PFOJ ¶ h, i, & j.